

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ORDER INN, INC.

Employer

and

Case 28-RC-094441

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 396,
AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

The International Brotherhood of Electrical Workers, Local 396 (Petitioner) seeks to represent a bargaining unit of approximately 41 employees who work at Order Inn, Inc. (Employer) in its Las Vegas call center and who are responsible for managing hotel guest food orders. The Employer and Petitioner agree that employees in the position of Operator and Customer Service Representative should be included in the unit, but disagree over the status of nine employees classified as In-charges. The Employer contends that In-charges are supervisors as defined in Section 2(11) of the Act and should be excluded, while the Petitioner contends that In-charges should be included in the unit because their duties are not sufficient to classify them as statutory supervisors. Based on the record and applicable case law, and as more fully set forth below, I find that In-charges are statutory supervisors and should be excluded from the unit found appropriate.

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended (the Act), a hearing was held before a hearing officer of the National Labor Relations Board (the Board). Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated, and I find, that the Employer, Order Inn, Inc., a Nevada corporation, with its principal office and place of business in Las Vegas, Nevada, is a company engaged in providing services to hotels in order to provide the various hotels' guests with food delivery service within and outside of the State of Nevada. During the 12-month period ending December 7, 2012, the Employer, in conducting the business operations, derived gross revenues in excess of \$1,000,000 and purchased and received at its Nevada facilities goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Nevada. Accordingly, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and, therefore, asserting jurisdiction over the Employer in this matter will accomplish the purposes of the Act.

3. **Labor Organization Status and Claim of Representation:** The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** This case presents the issue of whether In-charges should be excluded from the unit found appropriate on the basis that they are statutory supervisors. As discussed more fully below, I conclude that In-charges are statutory supervisors. In setting forth the reasons for my decision, I shall discuss the Employer's business operations, its management hierarchy, the job duties of In-charges, and the basis for my conclusion.

A. The Employer's Operations

The Employer operates a call center in Las Vegas and employs 41 persons exclusively connected to the call center. As part of its business operation, Employer has relationships with hotels nationwide. Employer assists these hotels' guests in placing food orders as a kind of outsourced room service.

B. Management Hierarchy

Dennis Varia is the Hotel Representative for the Employer and directly oversees the call center operations, spending roughly a tenth of his working day with call center concerns. Administrative Assistant Kathy Bagdasarian also manages call center employees by generating the employee schedule, meting out discipline, and receiving calls from employees who will be absent for their shifts. Previously, the position of Call Center Supervisor existed, but the Employer eliminated the position in late 2009 or early 2010. More recently, the Employer used a call center manager to oversee operations, but chose to leave this position vacant when it discharged its last call center manager in October 2012. Employees at the call center are divided into three main categories: Operator, Customer Service Representative, and In-charge. Each category of employee has some distinct duties and is paid a different rate. Operators are chiefly responsible for receiving calls from customers and taking steps necessary to complete food orders. Customer Service Representatives are chiefly responsible for calling customers who have placed orders to ensure that the customers' orders were satisfactorily fulfilled. The Employer generally pays its Customer Service Representatives \$.50 more per hour than Operators, and it generally pays its In charges \$.50 more per hour than Customer Service Representatives. Some long-term employees receive hourly pay that does not correspond to these differences.

C. In-charge Duties

In-charges are chiefly responsible for managing the labor costs associated with the call center. The Employer has implemented an automated system for monitoring the call center's

labor costs, a calculation of revenue being generated in relation to the amount being paid to staff the call center. The Employer's corporate office established an optimum ratio of cost per call and tasks In-charges with monitoring the computer system that reports the labor cost and ensuring that this cost does not rise above an average of \$1.85 per call. In order to achieve this, In-charges must ensure that the call queue does not rise to a point where calls are sent to an overflow center, thereby losing potential revenue for the Employer. In-charges strike a balance by sending employees home when the reported cost-per-call rises above the optimum ratio.

In addition to the cost management duty, the Employer has assigned In-charges with a number of other responsibilities. In-charges select employees to whom new hires are assigned to receive training. In-charges may also assign Customer Service Representatives to perform the tasks of Operator as the call queue may demand. In-charges also may determine which employees are qualified to receive calls that present more complex issues. In-charges are authorized to employ extraordinary measures to ensure customer satisfaction. For example, while a Customer Service Representative is only authorized to issue a \$15 credit to a customer, an In-charge may issue any amount within reason according to the In-charge's discretion.¹ Any exceptional remedy would need to be approved by Hotel Representative Varia.

There are currently nine In-charges. In the past, Employer operated with four In-charges, but recently added five In-charges, including two in training at the time of the hearing. In-charges exercise the authority of an In-charge while training. Previously, a call center manager oversaw all three categories of employees. As recently as 2010, In-charges issued discipline. During her two-year tenure as Call Center Manager, Benilda Vivar removed this authority from In-charges. Vivar left the company on July 27, 2012. The Employer has not returned this authority to In-charges. During the six-week lapse that occurred before the Employer retained a new call center manager, the In-charges managed the call center. When the Employer decided to discharge the next – and also last – Call Center Manager in October 2012, Varia decided, based on input from then-current In-charges, to leave the Call Center Manager position vacant. Varia gave In-charges responsibility for overseeing the operations of the call center and reporting to him. As a result, a number of policies and procedures are in a state of development. Written protocols and procedures that were employed in the past have ceased to guide or govern In-charge task performance. Indeed, the Employer has not made these written materials available to current In-charges.

Currently, the Employer communicates the promotion of In-charges and their duties orally. While nine persons are currently designated as In-charges, only two In-charges act in that capacity per shift. With two daily shifts, a minimum of four In-charges are needed per day. Additional In-charges are needed to cover weekend shifts and to fill in when other In-charges are on leave. Collectively, the In-charges decide which of the In-charges will be acting on the following day. The remaining In-charges scheduled during that shift would act as Customer Service Representatives (or as Operators should the acting In-charges see fit).

¹ In the past, an In-charge's authorization to issue credit was limited to \$25, above which, an In-charge was required to seek managerial approval.

While In-charges would not be acting in the capacity as In-charge in relation to the call center staff, they retain their authority to use extraordinary measures to resolve customer issues.

D. Legal Analysis and Determination

The issue of whether or not In-charges are supervisors within the meaning of the Act arises chiefly from the Employer's past practice. Testimony from former employee In-charges demonstrates that In-charges' authority has varied with changes in management structure. Where, as here, the Employer has made recent and substantial changes in the duties of the In-charges, it is appropriate to consider such changes in determining whether that classification should be included in the Unit. *Union Electric Co.*, 217 NLRB 666, 667 (1975).

Section 2(11) of the Act lists the factors to be employed in determining whether or not an individual is to be considered a supervisor for purposes of the Act, including using their independent judgment and authority to: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or responsibly direct employees, to adjust their grievances, or to effectively recommend such action. As the party challenging the appropriateness of including In-charges under Section 2(11), the Employer bears the burden of proving that In-charges are supervisors. *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 (1989). Individuals are statutory supervisors if they hold the authority to engage in even one of the 12 supervisory functions listed in the Act, if their exercise of such authority requires independent judgment, and if their authority is held in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). When an employee uses independent judgment in deciding what job another employee shall perform and which employees shall perform it, that employee is said to be responsibly directing. *Oakwood* at 692 (also finding that charge nurses who assigned staff to specific patients were "assigning" within the meaning of the Act).

Most significant is the role of In-charges in dismissing employees from their shift in accordance with the In-charges' determination of the call center's staffing needs. In-charges carry out this function in the interest of the Employer. While the automated reporting of cost-per-call guides In-charges and though there is a protocol dictating the manner in which employees sent home are to be selected, In-charges are not bound by the protocol. The decision lies within their discretion and requires their exercise of independent judgment. Management takes no action, disciplinary or otherwise, against an In-charge for his or her choice to dismiss or not dismiss and whom to dismiss. Repercussions might result only if the In-charge fails to fulfill his or her primary responsibility of meeting the optimum cost ratio. Also, two particular In-charges, Perez and Friend, assist Administrative Assistant Bagdasarian in creating the schedule of the call center employees. In fulfilling the duties listed above, In-charges are assigning and responsibly directing employees. Testimony at hearing revealed that Varia relies entirely on advisement from the In-charges when issuing discipline, as indeed he must for practical purposes, considering his absence from the call center for the majority of his workday. In-charges effectively recommend discipline thereby meeting one of the indicia under 2(11). See *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004).

Besides the statutory indicia of supervisory status, there are a number of secondary factors that lead to the conclusion that In-charges are supervisors. See *Training School at*

Vineland, 332 NLRB 1412 (2000) (non-statutory indicia can be used as background evidence in determining supervisory status, though such secondary indicia are not dispositive in the absence of a statutory indicum). Although the time varies that an In-charge might spend in his or her capacity as In-charge, depending on whether or not he or she is selected as acting In-charge for the shift,² the In-charge's choices while acting affect the schedule, pay, and duties of the employees working at the time. Other facts revealed at hearing support a finding that In-charges are statutory supervisors. In-charges receive a higher wage. They are responsible for generating and signing off on daily log and end-of shift reports. Though In-charges are not contacted in the case that an employee expects to be absent, the daily log reports include reasons for employee absences. End-of-shift reports include recommended solutions to problems encountered during the shift, such as refraining from performing training during peak hours and providing more dedicated Customer Service Representatives. End-of-shift reports are communicated using via e-mail, and only In-charges are provided with a company e-mail address.

Furthermore, to find that In-charges are not supervisors would be to accept that Varia is virtually the sole supervisor. While not determinative, the ratio of supervisors to employees is a significant factor in determining supervisory status. See *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Varia testified that he spends roughly ten percent of his time with call center affairs, and his title of Hotel Representative suggests that his duties lie elsewhere. Were Varia the sole supervisor, he would be required to oversee 41 employees working from 7 a.m. to 12 a.m. seven days a week during ten percent of his work day. This would be unrealistic.

In sum, based on the foregoing, I find that In-charges are statutory supervisors within the meaning of Section 2(11) of the Act and should be excluded from the Unit found appropriate herein.

Accordingly, based on the record evidence, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b)(3) of the Act:

All full-time and regular part-time Operators and Customer Service Representatives employed by the Employer at its Las Vegas, Nevada call center; excluding In-charges, office clerical employees, confidential employees, sales employees, guards, and supervisors as defined in the Act.

There are approximately 32 employees in the unit found appropriate herein.

² The Board has ruled that an individual may be considered a supervisor despite exercising supervisory power on a less than fulltime basis. *Biewer Wisconsin Sawmill*, 312 NLRB 506 (1993).

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election that will issue soon, subject to the Board's Rules and Regulations.³ The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 396, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within **seven (7) days** of the date of this Decision, the Employer file with the undersigned two (2) copies of election eligibility lists containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to

³ Employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election. The notices shall remain posted until the end of the election. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays. A party shall be estopped from objecting to non-posting of notices if it is responsible for the non-posting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least five days prior to the commencement of the election that it has not received copies of the election notice. Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Regional Office, 2600 N. Central Avenue, Suite 1400, Phoenix, Arizona, 85004, on or before **January 15, 2013**. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by January 22, 2013. The request may be filed electronically through the Agency's website, www.nlr.gov⁴, but may not be filed by facsimile.

Dated at Phoenix, Arizona, this 8th day of January 2013.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board

⁴ To file the request for review electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located on the Agency's website, www.nlr.gov.